FILED
FEB 28 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 808

ABRAHAM M. LIEBLING,
Petitioner,

vs.

FREDERICK LEVY, JR. ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SOLL J. SCHNITZ,
100 W. Monroe Street,
Chicago 3, Illinois,
Attorney for Petitioner.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinion Below (Appendix 1a)	1
Basis of Jurisdiction	2
Questions Presented	2-3
Statement of the Case	3-4
Reasons for Granting the Writ	4-6
Conclusion	20
Appendix	1a

CASES CITED.

Barrowman Coal Corp. v. Kentland Coal & Coke Co., 302 Ky. 428 7

Board of Underwriters v. Industrial Commission, 332 Ill. 615 ..... 5, 13

Brooks v. Saloy, 334 Ill. App. 93 ..... 7, 13, 16

Chicago Title & Trust Co. v. Forty-one Thirty-six Wilcox Bldg. Corp., 302 U.S. 120 15

Craftsman Finance Mortgage Co., Inc. v. Brown, 64 F. Supp. 168 7

Duke v. Harrison and Reidy, 270 Ill. App. 372 10

Hoefert v. Miller, 86 Ky. 72 8

Johnson v. Fetter, 224 Ky. 788 8

Kash v. Lewis, 224 Ky. 679 7

Leach v. Thomas, 27 Ill. 457 14

Mulder v. State of Illinois, 17 Ill. Ct. Cl. 1 ..... 5, 14, 15

Neptune Fire Engine and Hose Co. v. Board of Education of Mason County, 166 Ky. 1 ..... 6, 16

PAGE

Sarelas v. McCue & Co., 291 Ill. App. 540 .....9, 12

Schalucky v. Field, 124 Ill. 617 .....11, 12

Shadoin v. Sellars, 223 Ky. 751 .....7, 16

Smith v. Stevens, 133 Ill. 183 17

Stearns Coal & Lumber Co. v. Van Winkle, 221 Fed. 590 17

Thomas v. Kowalewski, No. 46799, 1st Dist. Ill. App. December 28, 1956 .....17, 19

Young v. Fitch, 181 Ky. 29 .....16, 19

STATUTES CITED.

Smith-Hurd Ill. Stat., Chap. 32, ¶157.94 .....8, 19

Ky. Rev. Stat. §271.585 .....8, 9, 11, 12, 19

Ky. Rev. Stat. §431.160 .....8, 19

TREATISES CITED.

13 Am. Jr. Vol. 13, Sec. 412, P. 465 6

Coke on Litteton - Co. Litt. 136 ..... 6, 7

Thompson on Corporations, Vol. 8, 3rd Ed. §6541.....6, 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No.

ABRAHAM M. LIEBLING,

Petitioner,

vs.

FREDERICK LEVY, JR. ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Abraham M. Liebling, prays that a writ of certiorari be issued to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the District Court was filed November 30, 1956, and is reported at 238 F. 2d 505 (a copy of this opinion is appended to the petition).

JURISDICTION.

On November 30, 1956, the Court of Appeals below affirmed the decision of the District Court (A copy of this opinion appears in the Appendix 1a). This petition is filed within ninety days of the decision filed by the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Did the Court properly consider the distinction between realty and a chose in action, owned by the dissolved corporation, in determining the rights and limitations of the surviving stockholders when suing in their own name?
2. Inasmuch as the plaintiff corporation was dismissed for want of capacity to sue, was the capacity of the surviving stockholders to be determined by the Statute of the incorporating State?
3. Did the Court read into both the Kentucky and Illinois "Survival of Remedy after Dissolution" Statutes, words or implication entirely foreign to that of the legislative intent, and to that heretofore expressed by any court of record?
4. Was not the Court uncertain as to when the stockholders acquired title to the corporate assets and the right to sue thereon,—at dissolution, or after the two year period?
5. Did not the Court place undue emphasis upon the surviving stockholders' "vested interests", without considering that a vested interest in a chose in action may be lost by failure to sue in apt time?

6. Did the Court properly consider that the stockholders' rights could have been safeguarded by a proper assignment of the judgment by the corporation?

7. Was the Court justified in saying that petitioner's authorities are not applicable because derivative actions were involved, without considering that its holding was also based on derivative actions?

8. Did the Court properly consider the difference between a suit on a judgment and *scire facias* in Illinois, and whether the judgment was *functus officio*?

9. Did the Court give proper weight to the record, the date of the judgment, corporate dissolution and filing suit, without any justification for the delay of almost thirteen years after the corporation's dissolution, in attempting to enforce the judgment?

STATEMENT OF THE CASE.

The Imperial Realty Company, a Kentucky corporation, on November 28, 1942, was dissolved according to the law of that State.

On August 29, 1939, a deficiency judgment in a mortgage foreclosure suit was rendered in the Circuit Court of Cook County, Illinois, in favor of the corporation and against the petitioner, in the sum of $31,968.54.

On June 14, 1955, the surviving stockholders of the dissolved corporation filed suit in the District Court in Chicago, on said deficiency judgment, to recover $28,862.26, the amount then due after the application of rent proceeds, plus interest and costs.

On September 22, 1955, the plaintiff stockholders filed an amended complaint, joining the corporation as party-

plaintiff, renewing their demand for judgment against the petitioner, in favor of the individual plaintiffs, or, in the alternative, in favor of the corporation.

Thereafter, petitioner filed his motion to quash the summons and to dismiss the amended complaint, which was allowed as to the corporation, but denied as to the individual plaintiffs. Petitioner was given leave to answer, but elected to stand on his motion that the plaintiff-stockholders lacked capacity to sue, whereupon the District Court entered judgment against the petitioner for the amount prayed for, plus interest and costs. The Court of Appeals for the Seventh Circuit, on November 30, 1956, affirmed the judgment of the District Court.

Petitioner now files his Petition for a Writ of Certiorari, to the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING WRIT.

This case should be reviewed by this Court because the opinion of the Court below, if left unchallenged, would proclaim as authority, a doctrine, predicated upon a distortion of fundamental legal concepts and statutory construction.

The Court of Appeals did not properly consider the legislative intent of the Survival of Remedy Statutes after corporate dissolution, which provide a remedy unknown to common law; the nature of stockholders' ownership of the corporate assets upon dissolution, in realty or a chose in action, and whether the capacity of surviving stockholders to sue on a chose in action is determined, as is the capacity of the dissolved corporation, by the law of the incorporating State.

The Court of Appeals was not justified in its statutory construction, by reading therein, an interpretation not

heretofore expressed by any court of record. Nor was the court correct in its interpretation of Illinois law, by refusing to take note of *Mulder* v. *State of Illinois,* 17 Ill. Ct. Cl. 1, contrary to the opinion expressed by this Court, on the presumed theory that petitioner's citations involved some form or other of derivative actions, notwithstanding that the Court itself, in support of its own decision, cited favorably, derivative actions to justify its conclusion.

Nor was the Court justified in placing on a pinnacle, the stockholder's purported vested rights, in cloaking a surviving stockholder with a life far in excess of that given the original corporate judgment holder, and to ignore with mere passing reference that a purported vested right of action is lost by failure to sue within the statutory time allotted (*Board of Underwriters* v. *Industrial Comm.,* 332 Ill. 615).

The opinion of the Court of Appeals indicates an uncertainty as to when a right of action is acquired by the surviving stockholders, whether upon dissolution or not.

The Court erred in its construction that only the rights which accrue to the corporation before dissolution are affected by the two-year statute, and not that of the surviving stockholders. The Court was not justified in reading out of context an admission by the petitioner that a suit would properly lie, if assignment of the judgment had been made before dissolution, by ignoring the express language to that effect in *Mulder* v. *State of Illinois, supra.*

Nor did the Court properly conceive the distinction in Illinois between *scire facias* action to revive a judgment and a new suit on a judgment. The Court of Appeals was

in error in being unconcerned about the state of the record, without the plaintiffs legally justifying their failure to institute suit on the judgment almost thirteen years after the dissolution of the corporation.

I

"Under common law, upon dissolution of a corporation, according to Lord Coke, realty reverted to the grantor or his heirs; personalty, like the *bona vacantia* of the Roman law—having no owner—vested in the sovereign; debts due to the corporation were totally extinguished because there was no creditor who could accept payment (Co. Litt. 136).

"Under the modern doctrine the real property of a dissolved business corporation does not revert to the grantor, and the personalty does not escheat to the commonwealth; but both species of property vest in a receiver or other trustee, to be administered by him for the benefit of the dissolved corporation's creditors and shareholders." (*Neptune Fire Engine and Hose Co.* v. *Board of Education of Mason County,* 166 Ky. 1).

The lower Court cited Thompson on Corporations, Vol. 8, 3rd Ed., Sec. 6541, that the dissolution of a corporation does not terminate the property rights of the stockholders but that the legal title passes to them as tenants in common, or partners; and American Jurisprudence, Vol. 13, Sec. 412, page 465, that the "dissolution of a corporation works a change in the form of interests of its members—and substituting the thing which the stock represented—that is, a legal interest in the property—and leaves the members to such a division of this."

Granted, that the stockholders, upon corporate dissolution, held as partners and that they now have substituted a legal interest in that which the stock formerly

represented, namely, partners in a chose in action, nonetheless, the Court failed to recognize the distinction made at Common Law by Lord Coke, between realty and personalty, but cited cases in all of which some form of realty to which the stockholders succeeded was involved,[1] but in not one instance, is there any authority cited by the Court that plaintiffs had any right to sue as owners of the chose in action on the record presented after the corporation, in whose favor the judgment ran, was held lacking in capacity to sue.

The Court overlooks the distinction that one having an interest in real property cannot be divested of it without affirmative action by one who would seek to deprive him of it. However, an interest in a chose in action may be lost by the owner simply by his failure to take proper action in the time required by law.

II.

The Court of Appeals, having decided in conformance with Thompson on Corporations, *supra*, that the stockholders hold legal title as partners to the instant chose in action, nonetheless deliberately avoided the question as to what law would thereafter determine partnership liability.

The doctrine expressed in *Craftsman Finance Mortgage Co. Inc.* v. *Brown*, 64 F. Supp. 168.176, succinctly states the accepted law.

> "We must look to the State Statute for the limitations of the Corporation's powers after it is dissolved."

Therefore, Kentucky law should determine the rights of the surviving stockholders, now holding as partners.

---

[1] **Brooks v. Saloy, 334 Ill. App. 93;**
Shadoin v. Sellars, 223 Ky. 751;
Barrowman Coal Corp. v. Kentland Coal & Coke Co., 302 Ky. 428;
Kash v. Lewis, 224 Ky. 679.

> "K.R.S. 413.160—*Actions Not Provided for by Statute: Ten Year Limitation.* An action re relief, not provided for by Statute, can only be commenced within ten years after the cause of action accrued."

Johnson v. *Fetter,* 224 Ky. 788, holds that actions involving partners are covered by this Section.

The instant suit was filed June 14, 1955, which is twelve years, six months and sixteen days after the most favorable date of the corporation's dissolution (November 28, 1942), or more than two and one half years after the ten year period in which partners may bring suit, according in Kentucky, the incorporating state.

We submit that the Court of Appeals was in error in not applying the Kentucky law of limitations in accordance with the facts presented, particularly since the general policy of the incorporating state was expressed in *Hoefert* v. *Miller,* 86 Ky. 72:

> "It has become the legislative policy of this State to fix in every case, a limit of time for beginning every action or proceeding for relief."

III.

No Court has ever placed such a judicial construction and interpretation of the Corporate Revival Statutes (K.R.S. 271.585 and Smith-Hurd Ill. Statutes, Chap. 32, Par. 157.94), as has the Court of Appeals by emphasizing and accentuating that the Statute "by its express language applies only to 'any right or claim existing, or any liability incurred prior to such dissolution' ".

When the Court of Appeals says that "It is obvious that the right or claim of Imperial in the Chicago judgment against defendant existed prior to the time of its

dissolution, but is equally obvious that the right or claim of plaintiffs in suit, was not in existence prior to that time," we submit that this is judicial interpretation of the statute absolutely foreign to legislative intent.

Nowhere is there any authority for the Court's conclusion that since the corporation's judgment against the petitioner existed before dissolution, that the limitation of the Statute (K.R.S. 271.585) applied to it, but not to the stockholders, because their claim in the judgment was not in existence prior to corporate dissolution, and that therefore they were exempt from its limitations.

The Court of Appeals overlooked entirely our citation of *Sarelas* v. *McCue & Co.*, 291 Ill. App. 540 (1937), when the Court said that "Defendant (petitioner herein) concedes as much in his brief," that the limitation law of the forum (Illinois) must be applied.

In the *Sarelas* case (*supra*) by virtue of Section 53 of the Corporation Act of 1919, the plaintiff brought suit in equity on behalf of himself and all other creditors of a corporation, to recover unpaid stock subscriptions from the stockholders and to recover from directors of the corporation for assenting to a corporate indebtedness in excess of capital in violation of Section 23 of the Act.

Section 79 of the Corporation Act of 1919 (Cahill's Ill. Rev. St. 1931, Ch. 32, §79) provided that after dissolution of a corporation, a creditor could bring suit provided he did so and summons was served on the corporation within two years.

The plaintiff in that case contended that it was the evident legislative intent that the phrase in Section 79 "and service of process had" must be construed to mean "service of process attempted or begun in good faith," and that the plaintiff and Sheriff made an effort in

good faith to service the corporation, but that service failed because of wrong information given the Sheriff by one of the defendant directors.

The Court said on p. 545: "We think this contention cannot be sustained. The section is plain and unambiguous and not open for construction." Section 79 was not strictly a Statute of Limitations but a conditional limitation upon the plaintiff's right of action.

Significant is the court's statement p. 547-548, "but are of the opinion that where a corporation is dissolved, suit must be brought and summons served within two years after such dissolution, as provided in Section 79 of the Act of 1919, and that the Statute of Limitations of five years (providing for statutory liability against directors for assenting to indebtedness of corporation in excess of its capital in Section 23 of the Act of 1919) is not applicable where the corporation has been dissolved before suit."

In *Duke* v. *Harrison and Reidy*, 270 Ill App. 372, suit was brought to enforce liability against the stockholders by reason of unpaid stock. The Court in analogy pointed out that no right existed at common law for wrongful death of a person. The Statute created recovery and fixed the time within which action was to be brought. Said the Court on P. 380:

> "It is seen, therefore, that the Statute which creates the right, that is, the Injuries Act, places a limitation, not on defenses to the right of action, but upon the action itself."

The Court then held that where suit fails as to the corporation because of its not being brought within two years after the corporation's dissolution, it will also fail as to the stockholders, whose liability by reason of unpaid stock, is sought to be enforced.

Significant also is the holding in *Schalucky* v. *Field*, 124 Ill. 617, that in general, where the stockholder's liability within the limits imposed is primary, being analogous to the liability of a partner, the liability of a stockholder and the liability of the corporation are coterminous; and the Statute of Limitations begins to run in favor of the stockholder at the same time that it begins to run in favor of the corporation.

We respectfully submit that the remedies available "to or against such corporation, its directors or shareholders" (K.R.S. 271.585) are coterminous (*Schalucky* v. *Field*, *supra*), and that the construction of the statute is unwarranted and without precedent or justification, particularly when *Sarelas* v. *McCue*, *supra*, said: "The section is plain and unambiguous and not open for construction."

IV.

The Court of Appeals' interpretation of K.R.S. 271.585, indicates an uncertainty as to when the plaintiff stockholders acquired the capacity to sue on the judgment herein.

The Court cited *Thompson on Corporations*, *supra*, that the stockholders become partners in the corporate assets upon dissolution, nonetheless, indicates that the plaintiff stockholders could not sue until after the two year period expired, because any other conclusion, says the court, "would, if accepted, lead to the anomalous result of creating a bar to the capacity of the stockholders to sue at the same time they acquired title to and became vested with the ownership of the judgment, in other words, the stockholders of Imperial under this theory acquired a right which they could not from the beginning enforce."

We submit that the court was in error. The stockholders became partners in the corporate property upon dissolu-

tion. The stockholders did not have to wait until the expiration of the two year period, before acquiring title, and had two years to enforce their rights, as the statute intended, particularly since *Sarelas* v. *McCue, supra,* held the section plain and unambiguous, and *Schalucky* v. *Field, supra,* that the liability of a stockholder and the liability of the corporation are coterminous.

Query: If K.R.S. 271.585 allowed 15 years for a corporation to wind up its affairs, would the Court then say that the stockholders would have to wait until this 15 year period had ended before acquiring the right to sue on their own behalf?

V.

Nor was the Court justified in placing such an aura around the stockholders' "vested interest." It was never, we submit, legislative intent to give to one who derives title, whether by descent or operation of law, a title, superior than that from whom it was derived.

The time given a dissolved corporation to wind up its affairs, we submit, is one of "corporate rigor mortis" where the clenched fist even after death shows movement in the inevitable releasing of the muscles after the last surge of blood has ceased. It is inconceivable that it was legislative intent that during this two-year period of "rigor mortis" there could be a rebirth of a new cause of action in favor of the stockholders in excess of ten years beyond the two-year period allowed the corporation.

We submit that corporations and stockholders are created by statute, in the same breath, and, as water cannot rise higher than its source, not be purer than the fount from which it springs, so too, can the rights of surviving stockholders rise no higher than that of the dissolved corporation from which they spring.

We submit that in discussing two Illinois cases, *Brooks* v. *Saloy,* and *Board of Underwriters* v. *Industrial Com. supra,* the Court failed to take cognizance of the distinction Illinois made in a vested interest in real estate and a chose in action.

In the *Brooks* case, to which further reference will be made, an interest in real property was involved. Board of Underwriters involved a compensation claim for accident and death which occurred February 26, 1925. Section 24 of the Compensation Act was amended, effective July 1, 1925, that unless, among other things, written claim for compensation was filed within one year after injury, the right to file application would be barred. Application was filed more than 15 months after injury and death.

Applicant contended that the limitation clause in Section 24 was not effective against her, because the right to compensation is a vested right and cannot be affected by subsequent legislation.

The Court said that shortening the time within which to begin proceedings to enforce her claim did not prejudice her right.

> "She and her counsel are charged with knowledge of the law and of its statutory changes, and as matter of public policy will not be heard to say they did not know of the change in the limitation."

We submit, that the Court of Appeals, in merely making passing reference to the *Board of Underwriters,* ignored the salient doctrine therein and applicable to the case at hand—that while one may have a vested right in a cause of action, one may divest himself thereof by his own inertia, in failing to take action within proper time. Also, that if a vested judgment in favor of a corporation may be lost by the passing of time, then, there is nothing sacred about

a "vested interest" in the judgment to which the stockholders succeed, that cannot also be lost by the passage of time.

VI.

Petitioner admitted that if the corporation had properly assigned the judgment during the period of winding up its affairs, that his defense to the suit would be untenable. *Leach* v. *Thomas*, 27 Ill. 457. The Court of Appeals said it could see no difference in the interest plaintiff stockholders acquired by operation of law from that which they would acquire by assignment.

Against this contention, we submit that the Court of Appeals completely overlooked our citation of *Mulder* v. *State of Illinois, supra.* The corporation there was engaged in building hospitals for the State of Illinois. Three claims were filed against the State; two by creditors, who were assignees of the corporation, under assignments made prior to dissolution, and the third by the receiver of the corporation.

The Court held that the assignments of the claims having been made prior to dissolution, the assignees should have the right to present the claims against the State within the statutory period of 5 years from the time the right of action accrued:

> "We are of the opinion that the assignee of a valid claim made by a corporation in existence, can prosecute such claim after dissolution of the corporation."

As to the other claim, the court said:

> "We are of the opinion from a careful study thereof that the 2 year limitation was only intended to aid in expediting the closing up of the corporate affairs after the dissolution of such corporation; that the J. B. French Company, having been dissolved as a cor-

poration on June 20, 1932, could not file a valid claim against the State at time the instant claim was filed, i.e. April 16, 1935. *Further, that the stockholders or creditors of corporation ought not to be permitted to extend time of settlement of corporation's affairs beyond statutory period by delaying filing of claim in behalf of corporation after the two-year period, and thus, through the medium of receivership, gain rights which could not otherwise be had by the extinct corporation.*" (Emphasis added.)

Therefore, as the *Mulder* case shows, the proper assignment of the judgment by the corporation would have complied with the statutory requirement of winding up the corporate affairs, but would have also provided a live judgment holder in whose name a *scire facias* action or suit on a judgment would lie, as we shall later show.

VII.

The Court of Appeals seeks to avoid the clear-cut holding by other courts that according to Illinois law, the plaintiff stockholders lack capacity to sue, by saying, that what was said in *Chicago Title and Trust Co.* v. *Forty-One-Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120: "The stockholders, however, now seek to escape the penalty for this dereliction (allowing corporation to be dissolved) by resuscitating and continuing the corporation and to that end, invoke the aid of a federal statute. This is simply an attempt to thwart a valid state law," and *Craftsman Finance & Mortgage Co.* v. *Brown, supra,* and other cases, including, we might add, *Mulder* v. *State of Illinois, supra,* are not applicable, because,

> "These and other like cases which could be cited involve in one form or another derivative actions by stockholders seeking some claim or right for and on behalf of a dissolved corporation."

Notwithstanding its presumed differentiation, the Court of Appeals has cited as authority for its position, derivative actions, both in Kentucky and Illinois, on behalf of stockholders, for the recovery of interests in realty.

In Kentucky,—*Shadoin* v. *Sellars, supra,* is illustrative. There, three stockholders sued another to cause mineral leases, which corporation had acquired before dissolution, to be sold and the proceeds divided amongst the stockholders. The Court said while it could find no authority therefor, that while this might distinguish the case from *Young* v. *Fitch,* 181 Ky. 29, that it would rely on that case to support its holding that where there are no directors, the stockholders may wind up the affairs of the corporation.

It should be noted to further illustrate the distinction between interests in realty and in a chose in action, that in the *Shadoin* case, the Court there said since plaintiffs' rights affected real estate, action must be brought in the County where realty is situated and not elsewhere.

Neptune Fire Engine & Hose Co. v. *Board of Education of Mason County,* 166 Ky. 1 cited in *Young* v. *Fitch, supra,* the Court held that both species of property, real property and personalty, vest in a receiver or other trustee, to be administered by him for the benefit of the dissolved corporation's creditors and stockholders.

Young v. *Fitch, supra,* was a suit brought by the surviving directors against some of the stockholders for the purpose of selling the land and mineral rights of the company and distributing the proceeds among all the stockholders.

In Illinois,—*Brooks* v. *Saloy, supra* (aside from allegations of gross inadequacy of price as to shock the conscience of a Court of Equity) involved a corporation

which owned a garage and was dissolved January 6, 1944. Plaintiffs, as owners of 25 of 1275 share interest in the property sued on April 24, 1946, on behalf of all the stockholders, for partition, to quiet title and to sell the property to distribute the assets pro rata. The Court on page 101, cited *Stearns Coal & Lumber Co.* v. *VanWinkle,* 221 Fed. 590:

> "The right of the stockholders to maintain this action depends upon the nature of the title which they, as former stockholders had in the corporate assets at the time suit was begun. . . . For the purpose of mere recovery of the corporate property from an adversary party, there was no imperative necessity for the appointment of a receiver or trustee to act as representative plaintiff. The suit was in fact representative."

We submit, therefore, that the attempted distinction of derivative suits, as not being applicable to petitioner's contentions, is without merit.

VIII.

That an action in debt upon a judgment is a new action, while a *scire facias* proceeding is merely a continuation of the old action, is accepted Illinois law (*Smith* v. *Stevens,* 133 Ill. 183).

The recent case of *Thomas* v. *Kowalewski,* No. 46799, 1st District, Illinois Appellate Court, opinion rendered December 28, 1956, and not yet appearing in the advance sheets, further supports petitioner's contention that the corporation, in order to safeguard plaintiff's rights, should have assigned its judgment to a live judgment holder, so that either a *scire facias* or a new suit on the judgment would prevail. This was a creditor's suit to establish a lien on real estate. Judgment was conferred in October, 1940 against Nellie and Roman Kowalewski. Nellie died June

8, 1947. The judgment was dormant in October, 1947 and revived in April, 1950.

The question, said the Court, was whether Nellie, having died prior to the revival of the judgment, rendered that judgment *functus officio.* The Court said that a live judgment was a prerequisite to a suit in aid of a legal execution.

The Court, in dismissing the suit for want of equity, said:

> "The policy of Illinois underlying the lien section, Chapter 77, Par. 1, and the dormant judgment section, Chapter 77, Par. 5, of the Statute, is the necessity of keeping property in the stream of commerce by unfettering it after seven years, where the creditor has not been diligent in protecting his right."

We submit the pertinency of this decision to petitioner's case.

Certainly, the corporation's judgment herein was *functus officio,* so that a *scire facias* action to revive it would not lie. Could plaintiff, in the new suit before this Court, in an attempt to get a new judgment have a better standing before the Court than one who was attempting to revive a dormant judgment in the old action? Particularly in view of the language in the *Kowalewski* case as to the policy in Illinois of keeping property in the stream of commerce where the creditor has not been diligent.

IX.

Finally, petitioner contends that the Court of Appeals was in error in not being concerned as to why the record disclosed no action was heretofore taken against petitioner to recover on the judgment.

We again refer the Court to *Young* v. *Fitch, supra,* that:

> "So long a time might be allowed to intervene between the death of the corporation and the institution of such a suit as to affect the interests of other persons not officers or stockholders and therefore give them the right to interpose the defense that the long delay on the part of the officers of the corporation barred their right to maintain the action. But where, as in this case, no person is complaining that any injustice will be done on account of the delay—"

We submit that the current suit by the plaintiffs, almost thirteen years after the dissolution of the corporation, without showing of justifiable excusable delay, is *contra* to the law of Kentucky (*Young* v. *Fitch, supra*), and also that of Illinois, pursuant to the cases heretofore cited, and particularly *Thomas* v. *Kowalewski, supra,* where the judgment, as here, was *functus officio* and *contra* as therein stated, to the policy of Illinois.

It is respectfully submitted that the decision of the Court of Appeals would proclaim new and bad law, contrary to the acknowledged fundamental concepts of our prevailing law.

It would destroy the common law distinction between interests in realty and a chose in action; would place a new and novel construction on Kentucky and Illinois Statutes, K.R.S. 271.585 and Smith-Hurd Ill. Stat., Chap. 32, par. 157.94, and its application contrary not only to legislative intent, but also to any decision by any court in those respective states; would ignore completely the applicability of the Kentucky Statute, K.R.S. 413.160; and would place a premium on inertia, delay and lack of diligence.

We submit that if this decision is left unchallenged, no man would never be able to completely schedule his credi-

tors in a bankruptcy petition, because, if thirteen years after the corporation's dissolution, the stockholders were held to be the owners of the judgment, how could he schedule his debt if he had no way of knowing who his creditors were?

Every case, *contra* to legislative intent, where a dissolved corporation is involved, could become another celebrated *Jarndyce* v. *Jarndyce*.

The plaintiffs should be held lacking in capacity to sue and the judgment reversed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SOLL J. SCHNITZ,
Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11766 SEPTEMBER TERM AND SESSION, 1956

FREDERICK LEVY, JR., et al.,
Plaintiffs-Appellees,
v.
ABRAHAM M. LIEBLING,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 30, 1956

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

MAJOR, *Circuit Judge.* The Imperial Realty Company, a corporation incorporated under the laws of the State of Kentucky (hereinafter referred to as Imperial), by resolution adopted by its Board of Directors on March 23, 1942, determined to liquidate its business, and on November 28, 1942, a Certificate of Dissolution was recorded in the office of the Clerk of the County Court of Jefferson County, Kentucky. The sole stockholders at the time of dissolution were plaintiffs, Frederick Levy, Jr., Adelaide S. Miller and Maude B. Levy, now deceased. Plaintiff, The Liberty National Bank and Trust Company of Louisville, Kentucky, has succeeded to the interest of the deceased stockholder.

On August 29, 1939, there was entered by the Circuit Court of Cook County, Illinois, a money decree against Abraham M. Liebling (defendant in the instant action),

then and now a citizen and resident of Cook County, Illinois, in favor of Imperial, representing a deficiency judgment in a mortgage foreclosure suit.

On June 14, 1955, plaintiffs filed in the District Court the present suit to recover $28,862.26, the amount then owing on said deficiency judgment, plus interest thereon and costs. On September 22, 1955, plaintiffs filed an amended complaint joining Imperial as a party-plaintiff, renewing their demand for judgment against defendant in favor of the individual plaintiffs or, in the alternative, in favor of Imperial.

On November 14, 1955, defendant filed his motion to quash the summons and dismiss the amended complaint, which, on February 1, 1956, was allowed as to Imperial for want of capacity to sue but denied as to individual plaintiffs, with leave to the defendant to answer. Defendant refused or neglected to answer within the time required, whereupon the court, on March 15, 1956, upon plaintiffs' motion entered a default judgment against defendant. From this judgment defendant appeals.

The gist of defendant's contention, as shown in his statement of contested issues, is that plaintiffs as former shareholders of Imperial lacked capacity to sue and that this inevitably follows from the fact that Imperial lacked such capacity, as held by the District Court. In connection with this contention it is argued that inasmuch as the capacity of Imperial to sue or be sued must be determined by the law of Kentucky, the laws of limitation of that State must be applied in determining the capacity of plaintiffs as former stockholders to sue. Stated another way by defendant, the issue is whether Illinois, which rendered the judgment in favor of a Kentucky corporation, since dissolved, will, when a remedy is sought by its former stockholders, apply its own laws of limitation.

Plaintiffs state the sole contested issue is whether the Illinois twenty-year statute of limitations relating to actions on judgments is applicable to a suit brought in Illinois on an Illinois judgment against an Illinois resi-

dent by former stockholders of a dissolved Kentucky corporation. Defendant apparently relies upon a Kentucky statutory provision entitled "Survival of Remedy after Dissolution," which provides that such dissolution "shall not take away or impair any remedy available to or against such corporation, its directors or shareholders, for any right or claim existing, or any liability incurred prior to such dissolution, if suit thereon is commenced within two years after the date of such dissolution * *." K.R.S. 271.585. It may be noted, although perhaps not material, that Illinois has a statutory provision almost identical in terminology. Smith-Hurd Illinois Statutes, Chap. 32, Par. 157.94.

As noted, Imperial filed its Certificate of Dissolution November 28, 1942, and it appears plain that under the provision just quoted any action for or against it was limited to a two-year period. On expiration of that period it became extinct for all purposes and it no longer had the capacity to sue or be sued. We are unable to agree, however, for reasons subsequently shown, that this provision had a like effect or any effect upon the rights of plaintiffs as former shareholders of Imperial. The provision by its express language applies to "any right or claim existing, or any liability incurred prior to such dissolution." It is obvious that the right or claim of Imperial in the Chicago judgment against defendant existed prior to the time of its dissolution, but it is equally obvious that the right or claim of plaintiffs in suit was not in existence prior to that time.

For some reason not disclosed by the record and with which we need not be concerned, Imperial prior to the time of its dissolution or during the following two-year period in which it might have done so, took no action to recover from defendant on account of the Chicago judgment. As a result of its failure in this respect this property right vested in plaintiffs, then shareholders of Imperial. Thompson on Corporations, Vol. 8, 3rd Ed., Sec. 6541, states: "* * The dissolution of a corporation does not terminate the property rights of the stockholders. The

property of corporations becomes vested in its members and stockholders upon dissolution. The legal title of the property passes to them as tenants in common, or partners subject to corporate liability."

American Jurisprudence, Vol. 13, Sec. 412, page 4[illegible]5, states the rule as follows: "* * the act of dissolution of a corporation works a change in the form of the interests of its members by destroying the stock and substituting the thing which the stock represented—that is, a legal interest in the property—and leaves the members to such a division of this." This statement was quoted with approval in *Tillie Brooks et al.* v. *Saloy et al.*, 334 Ill. App. 93, 100. The same principle is recognized by the courts of Kentucky. In *Shadoin* v. *Sellars*, 223 Ky. 751, the Kentucky Court of Appeals, after citing numerous Kentucky cases, stated: "Under the rule announced in these cases when the corporation ceased to exist in 1914 the property then standing in its name vested in the stockholders." See also to the same effect *Barrowman Coal Corp.* v. *Kentland Coal and Coke Co.*, 302 Ky. 428, and *Kash* v. *Lewis*, 224 Ky. 679.

Thus, we think it can hardly be open to doubt but that the stockholders, at the time Imperial became extinct for all purposes including the two-year period allowed by Kentucky law for the winding up of its business, acquired the title to and became the owners of the judgment which they now seek to enforce. Defendant's contention that the same limitation period which controlled Imperial's capacity to sue is also applicable to the stockholders would, if accepted, lead to the anomalous result of creating a bar to the capacity of the stockholders to sue at the same time they acquired title to and became vested with the ownership of the judgment. In other words, the stockholders of Imperial under this theory acquired a right which they could not from the beginning enforce.

Defendant in support of his thesis that "state's laws of limitation must be construed in determining the capacity of the surviving stockholders to sue," cites *Craftsman Finance Mortgage Co., Inc.* v. *Brown et al.*, 64 F. Supp.

168, and *Chicago Title and Trust Co.* v. *Forty-one Thirty-six Wilcox Bldg. Corp.*, 302 U.S. 120. These and other like cases which could be cited involve in one form or another derivative actions by stockholders seeking some claim or right for and on behalf of a dissolved corporation. The *Wilcox* case is illustrative, wherein former stockholders of a corporation which had been dissolved in accordance with the law of Illinois sought its reorganization under Sec. 77 (b) of the Bankruptcy Act. The court held the proceeding could not be maintained on the basis that the corporation had previously become extinct under procedure prescribed by the law of the state which was controlling.

There is great contrast, however, between those cases and the one at bar wherein plaintiffs seek nothing for and on behalf of a corporation now extinct of which they were former stockholders but seek a recovery upon a vested interest which they acquired by operation of law. In fact, this action was not brought by plaintiffs in their capacity as former stockholders of Imperial, as defendant in his brief so often states. The suit was brought in their individual capacity, and their status as former stockholders is immaterial other than to show the manner by which they acquired a right sufficient to authorize the maintenance of a suit.

Defendant in his reply brief states: "* * we will admit at the outset that our position would be untenable, if, * * * the corporation, during the period of winding up its affairs, to which we have referred as 'corporate rigor mortis,' would have properly assigned its judgment * * *." In other words, defendant concedes that plaintiffs could maintain the instant action if they had acquired a vested right by reason of an assignment made by Imperial during the two-year period allowed it for winding up its business. We are unable to discern why plaintiffs' capacity to sue should be made to depend upon the manner in which they acquired title and a vested interest in the Chicago judgment. The title and interest which they acquired by operation of law was no different from that which they would have acquired by assignment.

It is thus our conclusion that plaintiffs were not lacking in capacity to sue because Imperial, of which they were former stockholders, after its dissolution lacked such capacity. Such being the situation, it follows almost as a matter of course that the limitation law of the forum, that is, of Illinois, must be applied. Defendant concedes as much in his brief. See, however, *Seymour* v. *The Union News Co.*, 217 F.2d 168, 170, and *Chicago Board of Underwriters* v. *The Industrial Commission et al.*, 332 Ill. 611, 615.

We have considered other minor contentions advanced by defendant which we find without merit or which, in any event, would not alter the conclusion which we have reached. No purpose could be served, therefore, in discussing such matters.

The judgment is

AFFIRMED.

FILED
MAR 29 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 808

ABRAHAM M. LIEBLING,
Petitioner,

vs.

FREDERICK LEVY, JR., ET AL.,
Respondents.

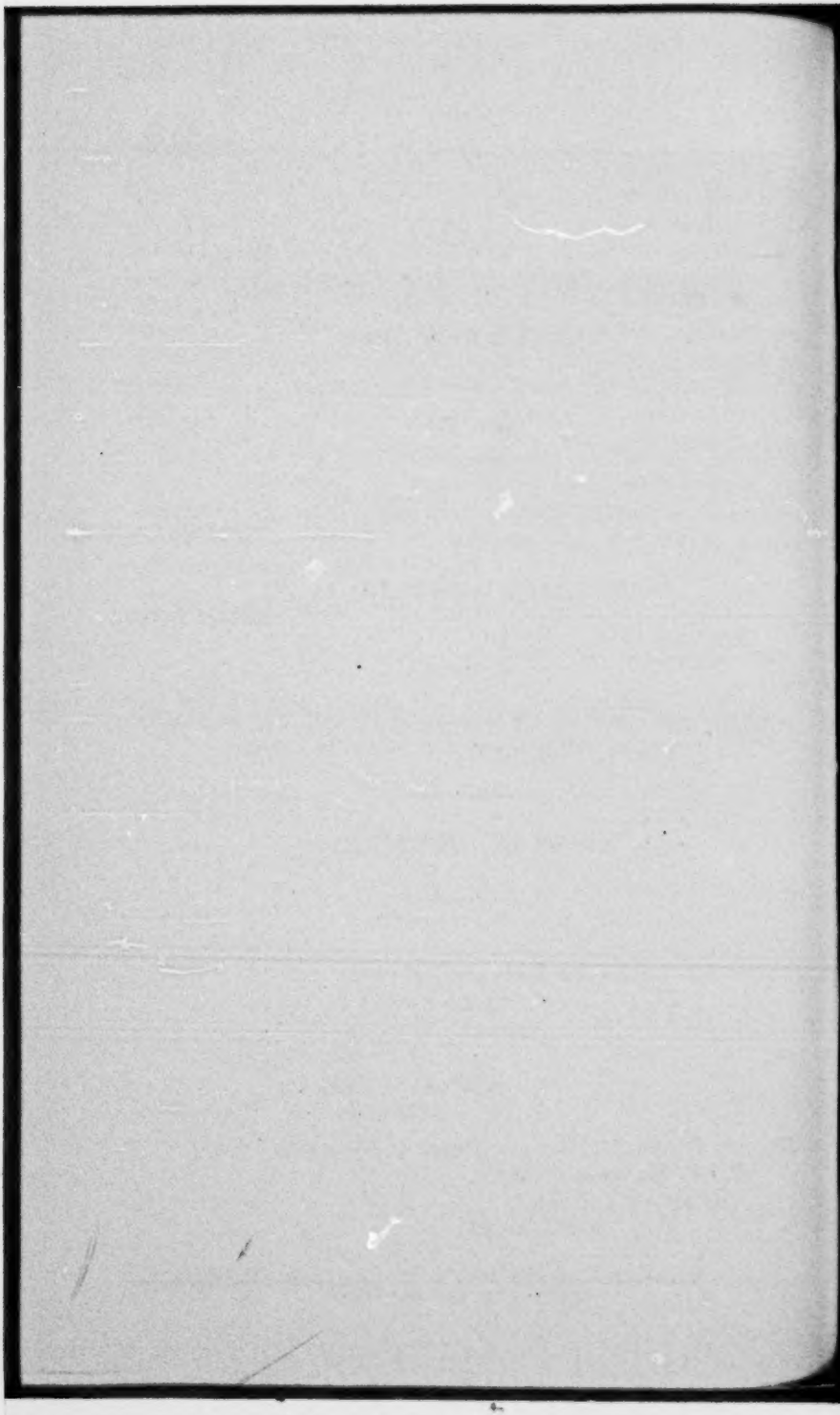
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

FRANK D. MAYER,
LOUIS A. KOHN,
JAMES C. MALLATT,
231 S. La Salle Street,
Chicago 4, Illinois,
Attorneys for Respondents.

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT,
231 S. La Salle Street,
Chicago 4, Illinois,
Of Counsel.

THE DONNELLEY-GARDEN PRINTING COMPANY, CHICAGO



INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2-4
Reasons for Not Granting the Writ	4-11
A. This is not an appropriate case for certiorari since all that is involved is the construction of a state statute on a narrow question of local law and no federal question or question of general importance has been presented	4-5
B. The decision of the Court of Appeals is correct in all respects	5-11
1. The Court properly construed the Kentucky statute as not applicable to the instant case	5-9
2. The Court properly held that respondents validly acquired title and interest in the judgment by operation of law	9
3. The Court properly applied the Illinois statute of limitations	9-10
4. The Court properly rejected the defense of laches	10-11
Conclusion	11
Appendix A—Kentucky Statute [Ky. Rev. Stat. (1946), § 271.585]	12
Appendix B—Illinois Statute of Limitations [Ill. Rev. Stat. (1955), c. 83, § 24b]	13-14

CITATIONS.

Cases.

Barrowman Coal Corp. v. Kentland Coal and Coke Co., 302 Ky. 428, 196 S. W. 2d 428 (1946) 6
Board of Underwriters v. Industrial Comm., 332 Ill. 611, 164 N. E. 216 (1928) 10
Brooks v. Saloy, 334 Ill. App. 93, 79 N. E. 2d 97 (1st Dist., 1948) 6
Green v. Stevenson, 295 Ky. 832, 175 S. W. 2d 519 (1943) 6
Horan v. New Home Sewing Machine Co., 289 Ill. App. 340, 7 N. E. 2d 401 (1st Dist., 1937) 9-10
Kash v. Lewis, 224 Ky. 679, 6 S. W. 2d 1098 (1928).. 6
Kicklighter v. New York Life Ins. Co., 145 F. 2d 548 (C. A. 5, 1944) 11
Klages v. Kohl, 127 Ill. App. 70 (4th Dist., 1906) 10
Klaxon Co. v. Stentor Co., 313 U. S. 487 (1941) 9
Magnum Co. v. Coty, 262 U. S. 159 (1923) 5
Mutual Trust and Deposit Co. v. Boone, ... Ky. ....., 267 S. W. 2d 751 (1954) 10
Sarelas v. McCue & Co., 291 Ill. App. 540, 10 N. E. 2d 700 (1st Dist., 1937) 7
Seymour v. Union News Co., 217 F. 2d 168 (C. A. 7, 1954) 10
Shadoin v. Sellars, 223 Ky. 751, 4 S. W. 2d 717 (1928) 6
Thibolo v. United States, 134 F. Supp. 88 (D. C. Cal., 1955) 11

Statutes.

Ill. Rev. Stat. (1955), c. 83, § 24b 2, 10, 11, 13
Ky. Rev. Stat. (1946), § 271.585 .....2, 5, 12
Ky. Rev. Stat., § 413.160 9

Treatises.

13 Am. Jr. § 412, p. 465 and § 1352, pp. 1197-1198 6
8 Thompson on Corporations (3rd Ed., § 6541) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 808.

ABRAHAM M. LIEBLING,

Petitioner,

vs.

FREDERICK LEVY, JR., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 238 F. 2d 505 and is reprinted in the Appendix to the petition for certiorari (Pet. App. 1a). The District Court rendered no opinion.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

The petition does not accurately state the questions that the case actually presents. We restate them as follows:

1. Whether the Court of Appeals was correct in holding that the two-year provision in the Kentucky statute [Ky. Rev. Stat. (1946), § 271.585] is not a bar to the present action.

2. Whether the Court of Appeals was correct in holding that plaintiff stockholders validly acquired title and interest in the judgment by operation of law.

3. Whether the Court of Appeals was correct in holding that the Illinois Statute of Limitations governs.

4. Whether the Court of Appeals should have considered the defense of laches in a suit at law on a judgment where petitioner failed to plead this defense.

STATUTES INVOLVED.

The pertinent provision of the Kentucky statute upon which petitioner relies is reprinted as Appendix A, p. 12. The controlling Illinois statute of limitations [Ill. Rev. Stat. (1955), c. 83, § 24b] is reprinted as Appendix B, p. 13.

STATEMENT OF THE CASE.

On August 29, 1939, there was entered by the Circuit Court of Cook County, Illinois, a money decree against petitioner (hereafter referred to as defendant), then and now a citizen and resident of Cook County, Illinois, in favor of The Imperial Realty Company, representing a deficiency judgment in a mortgage foreclosure suit (Tr. 7).

Imperial, a corporation incorporated under the laws of Kentucky, by resolution adopted by its Board of Directors

on March 23, 1942 determined to liquidate its business, and on November 28, 1942, a Certificate of Dissolution was recorded in the Office of the Clerk of the County Court of Jefferson County, Kentucky (Tr. 6). The sole stockholders at the time of dissolution were plaintiffs (respondents here) Frederick Levy, Jr., Adelaide S. Miller; and Maude B. Levy, now deceased (Tr. 7). Plaintiff, The Liberty National Bank and Trust Company of Louisville, Kentucky has succeeded to the interest of the deceased stockholder (Tr. 7).

On June 14, 1955, plaintiffs filed in the Federal District Court for the Northern District of Illinois the present suit to recover $28,862.26, the amount then owing on said deficiency judgment, plus interest thereon and costs. Thereafter, on July 8, 1955, defendant filed a motion to quash summons and dismiss the complaint. Plaintiffs, on September 22, 1955, filed an amended complaint (Tr. 6-8) joining the corporation as party-plaintiff, and renewing their demand for judgment against defendant in favor of the individual plaintiffs or, in the alternative, in favor of the corporation.

On November 14, 1955, defendant filed a motion (Tr. 8-10) to quash summons and dismiss the amended complaint, which, on February 1, 1956, was allowed by the District Court as to the corporation for want of capacity to sue, but denied as to the individual plaintiffs, with leave to defendant to answer (Tr. 11). On March 6, 1956, defendant moved to vacate (Tr. 12) that part of the order denying his motion to dismiss as to the individual plaintiffs or, in the alternative, asking the court to file findings of fact and conclusions of law.

On March 14, 1956, plaintiffs presented a motion for default judgment which was overruled (Tr. 13), and the court heard arguments with respect to defendant's motion to

vacate. After the court indicated that it would overrule defendant's motion (Tr. 14), defendant's attorney stated in open court that he refused to answer and desired to stand on his original motion (Tr. 8-10) to quash summons and dismiss the amended complaint, whereupon, the court, on March 15, 1956, entered judgment against defendant (Tr. 14-15).

On appeal, the Court of Appeals affirmed, holding that the two-year provision in the Kentucky statute relied on by defendant is not a bar to the rights of plaintiffs as former stockholders of the corporation (Pet. App. 3a, 4a) and that, therefore, as a matter of course the twenty-year limitation of the law of the forum, Illinois, must be applied (Pet. App. 6a). The court, in rejecting defendant's contention that plaintiffs could not sue on the judgment because they had acquired no title and interest by formal assignment from the corporation, held that the title and interest which plaintiffs acquired by operation of law was no different from and was as effective as that which they would have acquired by assignment (Pet. App. 5a).

Defendant's contention, which was never pleaded, that plaintiffs' rights were barred by laches, was considered and rejected by the Court of Appeals without discussion (Pet. App. 6a).

REASONS FOR NOT GRANTING THE WRIT.

A.

This is not an appropriate case for certiorari, even apart from the lack of merit in any of defendant's contentions. The Court of Appeals merely construed a state statute on a narrow question of local law and held that it did not bar a suit on a judgment. Thus, neither a federal question nor a question of general importance has been presented.

There is no conflict of federal decisions, and the rulings as to the law of Kentucky and Illinois do not conflict with any decision of the courts of those states.

It is obvious that defendant has overlooked the well settled limitations imposed by this Court in granting certiorari as stated by Chief Justice Taft:

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." (*Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1923).)

B.

1. Defendant argues that the Court of Appeals improperly construed the Kentucky two-year statute relied on (Pet., Points I, III, IV, V, VII), which reads in part as follows:

> [Dissolution] * * * "shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, *prior to such dissolution*, if suit thereon is commenced within two years after the date of such dissolution. * * *" (Italics ours.)

The Court held that the two-year provision in the Kentucky statute did not bar a suit brought in Illinois on an Illinois judgment against an Illinois resident by former stockholders of a dissolved Kentucky corporation (Pet. App. 6a).

This ruling is in accordance with the common law rule as to the rights of stockholders of a dissolved corporation (See court's opinion, Pet. App. 3a, 4a), to the effect that the property of a corporation vests in the stockholders as ten-

ants in common upon dissolution.[1] The Court of Appeals pointed out (Pet. App. 4a) that the two-year provision relied on by defendant merely modified this common law rule by postponing its operation for the period of two years, and, therefore, is not a bar to this action by the stockholders against a third person.

In *Green* v. *Stevenson*, 295 Ky. 832, 175 S. W. 2d 519, 523, 524 (1943), the court said:

> "The purpose of statutes allowing extension of time to a dissolved corporation for winding up its business is to provide for the administration of corporate property *by the corporation itself* during the period allowed, and to permit the title to its property to remain *in the corporation itself* until it winds up its affairs." (Italics ours.)

This shows that the Kentucky statute was not intended as a restrictive rule limiting the rights inherited from a corporate entity enforceable by the successors in interest of the corporation. Rather, it was intended as an expansive measure allowing the corporation to sue or be sued in its own name for two years after dissolution. Thus, the Kentucky statute does not wipe out at the end of the two-year period the rights of stockholders recognized by Kentucky law against judgment debtors of the corporation.

It is clear, as noted by the court below (Pet. App. 3a), that the statute "by its express language applies to 'any right or claim existing, or any liability incurred, *prior* to such dissolution'." Here, the "right or claim" did not vest in the stockholders until the corporation became extinct for all purposes or, in other words, until two years

1. See: *Shadoin* v. *Sellers*, 233 Ky. 751, 4 S. W. 2d 717, 719 (1928) and the cases cited therein; *Barrowman Coal Corp.* v. *Kentland Coal and Coke Co.*, 302 Ky. 428, 196 S. W. 2d 428 (1946); *Kash* v. *Lewis*, 224 Ky. 679, 6 S. W. 2d 1098 (1928); *Brooks* v. *Saloy*, 334 Ill. App. 93, 79 N. E. 2d 97 (1st Dist., 1948); 8 Thompson on Corporations (3rd Ed., § 6541); 18 Am. Jur. § 412, p. 465 and § 1352, pp. 1197-1198.

after dissolution, and the stockholders' rights as vested owners of the judgment could not have come into operation until the two-year period had run its course. In the words of the Court of Appeals (Pet. App. 4a), "Defendant's contention that the same limitation period which controlled Imperial's capacity to sue is also applicable to the stockholders would, if accepted, lead to the anomalous result of creating a bar to the capacity of the stockholders to sue at the same time they acquired title to and became vested with the ownership of the judgment. In other words, the stockholders of Imperial under this theory acquired a right which they could not from the beginning enforce."

Defendant, without citing authority, endeavors to distinguish the cases cited by the Court of Appeals (Pet. App. 4a) on the ground that realty and not personalty was involved (Pet. 6-7; 13-14). Suffice it to say that neither the Kentucky statute nor any of the cases cited by defendant make any such distinction. In any event, plaintiffs here are suing on a judgment which is a *perfected* property right and as such vested in the stockholders when the corporation became extinct for all purposes.

Although this is a matter of Kentucky law, defendant (Pet. 9-11) relies on Illinois cases. But each of these cases was an action by creditors for unpaid stock subscriptions and was governed by the express provision of the Illinois statute involved. For example, in *Sarelas* v. *McCue & Co.*, 291 Ill. App. 540, 10 N. E. 2d 700 (1st Dist., 1937) (Pet. 9), the Illinois statutes provided that a creditor could sue in equity after dissolution "all persons who are liable in any way for debts of the corporation, *by joining the corporation in such suit*" and "if suit thereon is brought *and service of process had* within two years after such dissolution." The case was dismissed because the summons had not been served on defendant corporation within the two-year period.

Defendant's contention that the Court of Appeals indicated an uncertainty as to when the stockholders acquired capacty to sue on the judgment (Pet., Point IV, 11-12) entirely overlooks the following clear statement by the court (Pet. App. 4a):

> "Thus, we think it can hardly be open to doubt that the stockholders, at the time Imperial *became extinct for all purposes including the two-year period allowed by Kentucky law for winding up its business, acquired the title to and became the owners of the judgment which they now seek to enforce.*" (Italics ours.)

The Court of Appeals (Pet. App. 5a) properly pointed out that certain cases cited by defendant (Pet. 15-17) involving derivative rights were not in point. Where suit was brought *on behalf* of the corporation to assert rights which it had not asserted, the Kentucky statute would act as a bar to an action brought more than two years after dissolution because the rights were derivative. But where, as here, recovery is sought by former stockholders *in their own behalf* on a claim previously reduced to judgment by the corporation, it is not barred. As the court said (Pet. App. 5a):

> "There is a great contrast, however, between those cases and the one at bar wherein plaintiffs seek nothing *for and on behalf of a corporation* now extinct of which they were former stockholders but seek a recovery upon *a vested interest which they acquired by operation of law.* In fact, this action was not brought by plaintiffs in their capacity as former stockholders of Imperial, as defendant in his brief so often states. This suit was brought in their *individual capacity, and their status as former stockholders is immaterial* other than to show the manner by which they acquired a right sufficient to authorize the maintenance of a suit." (Italics ours.)

2. Defendant admits that if the corporation had properly assigned the judgment to the stockholders during the period of winding up its affairs, his "defense to the suit would be untenable" (Pet. 14). This concession means, as the court below indicated, "that plaintiffs could maintain the instant action if they had acquired a vested right by reason of an assignment made by Imperial during the two-year period allowed it for winding up its business" (Pet. App. 5a). But no formal assignment was needed where the judgment vested in the stockholders "by operation of law" as the court below held (see 3a-5a Pet. App.). If the claim would be preserved if it had been assigned, the Kentucky statute obviously does not extinguish it after two years, and it makes no sense to say that a claim reduced to judgment prior to dissolution is preserved only if it is assigned. Thus, defendant's concession in itself demonstrates that his contention that the two-year provision in the Kentucky statute bars this action is "untenable".

3. Defendant apparently contends (Pet., Point II, 7-8) that since the law of Kentucky, the state of incorporation, should be applied to ascertain whether plaintiff stockholders have the capacity to maintain this action, its limitation laws must also apply. He, therefore, reasons (Pet. 8) that Ky. Rev. Stat., § 413.160, a ten-year general statute of limitations, is a bar to this action. This is an obvious misapplication of conflict of laws principles.

In deciding which limitations period shall apply, a federal court hearing a diversity case must look to the conflicts rule of the state in which it sits, *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487 (1941). Illinois, the state of the forum and the state which rendered the judgment sued on, follows the well-established general rule that the limitation law of the forum governs, *Horan* v. *New Home Sewing*

Machine Co., 289 Ill. App. 340, 7 N. E. 2d 401 (1st Dist., 1937); *Klages* v. *Kohl*, 127 Ill. App. 70 (4th Dist., 1906).[2] In Illinois, as well as generally, statutes of limitations are considered as being procedural, and thereby merely going to the *remedy* and not to the *right* to maintain an action, *Seymour* v. *Union News Co.*, 217 F. 2d 168 (C. A. 7, 1954); *Board of Underwriters* v. *Industrial Comm.*, 332 Ill. 611, 164 N. E. 216 (1928); *Horan* v. *New Home Sewing Machine Co.*, 289 Ill. App. 340, 7 N. E. 2d 401 (1st Dist., 1937); *Klages* v. *Kohl*, 127 Ill. App. 70 (4th Dist., 1906). Therefore, in the present case, the Illinois limitations period governs.

As has been indicated, Kentucky law controls the devolution of the corporation's property and in this respect must be considered to determine plaintiffs' standing to sue. This means Kentucky law determines whether plaintiffs have the *capacity* or *right* to bring suit as present owners of the judgment sued on, not the time when they can sue. But once it has been determined that plaintiffs have the right or capacity to sue, the limitation law of Illinois governs.

In the present action plaintiffs are suing in Illinois on an Illinois judgment against an Illinois resident, and twenty years have not elapsed. We therefore submit that the Illinois limitations statute [Ill. Rev. Stat. (1955), c. 83, § 24b], which provides that "*judgments in any court of record in this state*" may be sued on within twenty years next after the date of such judgment is controlling.

4. Defendant's attempt to interject laches (Pet., Point IX, 18-20) into the instant suit at law on a judgment is unjustified, since he failed to plead this defense (Tr. 8-11). Even if he had, laches is not available as a defense to a

2. Kentucky also subscribes to this principle, *Mutual Trust and Deposit Co.* v. *Boone*, ... Ky. ....., 267 S. W. 2d 751 (1954).

purely legal action such as this. See *Kicklighter* v. *New York Life Ins. Co.*, 145 F. 2d 548, 549 (C. A. 5, 1944); *Thibolo* v. *United States*, 134 F. Supp. 88 (D. C. Cal., 1955). The applicable Illinois statute providing that judgments may be sued on within twenty years fully disposes of this contention [Ill. Rev. Stats. (1955), c. 83, § 24b].

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANK D. MAYER,
LOUIS A. KOHN,
JAMES C. MALLATT,
231 S. La Salle Street,
Chicago 4, Illinois,
Attorneys for Respondents.

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT,
231 S. La Salle Street,
Chicago 4, Illinois,
Of Counsel.

APPENDIX A.

Kentucky Statute [Ky. Rev. Stat. (1946), § 271.585].

"Survival of Remedy After Dissolution.—The dissolution of a corporation, either by the issuance of a certificate of dissolution by the secretary of state, or by the decree of a court when the court has not liquidated the assets and business of the corporation, or by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution, if suit thereon is commenced within two years after the date of such dissolution. Any such suit by or against the corporation may be prosecuted or defended by the corporation in its corporate name."

APPENDIX B.

The Illinois Statute of Limitations [Ill. Rev. Stat. (1955), c. 83, § 24b]

"24b. Revivor of judgments by *scire facias*—Clerk of Court, duties of.] § 25. Judgments in any court of record in this State may be revived by *scire facias*, or by ordinary civil action in lieu of *scire facias* as provided by the Civil Practice Act, and all existing and future amendments thereto, or a civil action may be brought thereon within twenty years next after the date of such judgment and not after; and the provisions of the foregoing section shall apply also to this section: Provided, however, that actions to revive judgments in any court of record in this State by *scire facias* shall be commenced by affidavit of the judgment creditor or creditors, his or their agents, attorneys or assigns, setting forth a description of the original judgment by title of the action, date and amount thereof, together with a statement of any partial satisfaction of such original judgment that may appear of record at the time of making such affidavit, also setting forth a written designation of the return day for the writ.

The Clerk of such Court shall file such affidavit as a separate action which shall be ancillary to the action in which the original judgment was entered. Upon the entry of a judgment of revivor execution may be issued in the *scire facias* action. Upon the commencement of any action to revive a judgment by *scire facias* in a court of record in this State the clerk of such court shall enter upon the Judgment Docket record of the original judgment, a notation of the commencement of such *scire facias* action, setting forth the date and number of such *scire facias* action,

and, upon the entry by the court of a judgment of revivor in any *scire facias* action such clerk shall enter upon the judgment docket record of the original judgment, a notation of the entering of such judgment of revivor setting forth the amount, date and general number thereof."